

1-1-2004

Redefining the Transformative Use of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment

Jisuk Woo

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

 Part of the [Communications Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Jisuk Woo, *Redefining the Transformative Use of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*, 27 HASTINGS COMM. & ENT. L.J. 51 (2004).

Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol27/iss1/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Redefining the “Transformative Use” of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment

by
JISUK WOO, PH.D., J.D.*

Introduction	52
I. The Goal of Copyright and the Fair Use Doctrine	54
II. Development of the Transformative Use Rule.....	56
A. Productive Use in <i>Sony</i>	56
B. Transformative Use in <i>Campbell</i>	59
III. Transformative Use Rule and the Transformation of Fair Use Analysis.....	61
A. Ambiguous Relationship with the Market Effect Factor	61
B. Confusion Concerning the First Factor of the Purpose of Use	64
C. Transformativeness in the Production of Work Rather Than the Use of Work	65
IV. Suggestions for the Application of Transformative Use to Digital Works.....	67
A. Using the Rule As a Separate Policy Consideration.....	68
B. Acknowledging Creativity and Transformativeness in the Use and Individuals Users.....	71
Conclusion: Revisiting “Use” in the Interactive Environment.....	74

* Jisuk Woo is Assistant Professor at Seoul National University’s Graduate School of Public Administration. She received her Ph.D. in Communication from the University of Pennsylvania and her J.D. from New York University School of Law. Her main research interests are Internet law and policy in the areas of copyright, privacy, obscenity, free expression, and Internet governance.

Introduction

With the development of information technology, especially the digital media, copyright law has faced great challenges. The history of copyright law in relation to the development of information technology and communication modes suggests that modern copyright laws are a product of a particular information medium, printing technology.¹ Many of the copyright cases in courts that deal with new technologies reflect not only conflicting interests among stakeholders such as the music industry, Internet service providers, software programmers and users but also increasing tension between the role of laws and the development of information technologies. Without recognizing the changing nature of the digital environment and its participants, existing laws, including copyright law, may fail to achieve the objectives that they were designed to accomplish. At the same time, however, laws cannot continue to evolve in ways that change their fundamental principles without sacrificing the consistency and continuity that are the most important reasons for their existence. This paper attempts to incorporate the creativity and transformativeness of users' activities in the rules of copyright law as a proposed solution to this tension.

The ease of copying and distribution has triggered various efforts to expand copyright law and to strengthen the enforcement of copyrights. At the same time, critical scholars are disturbed by these efforts and suggest different ways in which the laws governing cyberspace may or should develop. For example, some, such as Yochai Benkler and Julie Cohen, favor preserving the public domain, arguing for the public's right to speak and express views freely by not expanding copyright for digital works.² Lawrence Lessig argues that "the code," the Internet's architecture, which once had transcended the strictures of ordinary law, now will end creativity and innovation on the Internet.³ Believing that law, not technology, has won the battle between copyright and technological development and has stifled the growth of creativity in the Internet, Lessig calls for a

1. See ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF THE LAW* 172-181 (1989); EDWARD PLOMAN & L. CLARK HAMILTON, *COPYRIGHT* (1980).

2. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Julie Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996).

3. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 3-8 (1999).

limiting of certain intellectual property rights.⁴ Similarly, Siva Vaidhyathan, who views copyright as policy rather than property, argues that copyright is not only unnecessary, but also is potentially destructive to creativity.⁵ He notes that the fair use doctrine in the copyright statute is evidence that the copyright system has always been somewhat leaky, and the doctrine should remain in the copyright law to allow breathing room. Other scholars, such as Jessica Litman and Pamela Samuelson, insist on preserving the fair use principles and applying them to digital works for the public's interests.⁶

The fair use rule, which many scholars acknowledge as an important tool for maintaining the balance of copyright, especially in digital works of authorship, was the major issue that marked the highly publicized copyright cases of the last few decades. Application of this fair use rule tends to generate the disagreements concerning digital copyright issues. The legal questions raised by Napster, the popular peer-to-peer file-sharing system, concerned whether the file-sharing activities of the users could be considered a fair use. In *A&M Records, Inc. v. Napster, Inc.*, the court's finding against a fair use rested on the position that downloading mp3 files does not transform the copyrighted work, users' downloading is a commercial use, users engage in wholesale copying of the entirety of the work, and users' downloading harms the copyright holders' attempts to charge for the same downloads.⁷ The court reached the same conclusion about Napster's identified uses of sampling and space-shifting. The traditional fair use analysis that does not tend to recognize simple reproductions of the copyrighted work and ordinary use of a consumer user led to the *Napster* decision and rationales.

Cases such as *Napster* suggest the need to explore why the fair use rule is at the center of the copyright controversies triggered by digital technology, how fair use decisions are made, what are appropriate criteria for fair use analysis, whether the analysis should be different for digital from other works, and how the concept of transformative use that becomes an increasingly popular standard in fair use analysis should be applied. This paper first will discuss the

4. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

5. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001).

6. JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 *BERKELEY TECH. L. J.* 519, 539-40 (1999).

7. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

significant role of the fair use doctrine in the copyright system and how it has been applied in recent copyright cases. Then the paper will explore how the notion of productive use and transformative use was developed and adopted, focusing on *Sony Corp. of America v. Universal Studios, Inc.* and *Campbell v. Acuff-Rose Music, Inc.*,⁸ and critically analyze how courts have interpreted *Campbell* in defining and applying the concept of transformative use to mean the “creation” of transformative work or “work” that has been transformed from the initial work rather than to mean transformative “use.” Finally, this paper will offer a new perspective to interpret and apply the transformative use principle that is more consistent with copyright’s purpose and encompasses digital works of authorship.

I. The Goal of Copyright and the Fair Use Doctrine

Modern copyright laws recognize the objective of copyright law to be the well-being of society, which is achieved by the encouragement of the creative intellectual activity of authors and artists, who are able to reap the rewards of their endeavors. The copyright clause of the U.S. Constitution provides that “Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁹ Thus, remuneration to authors is not seen to be the ultimate goal of copyright protection required in the Constitution but a tool to establish an incentive for authors to create. The utilitarian purpose of copyright, expressed in the statement “to promote the Progress of Science and useful Arts,” also is found in the original British copyright statute, the Statute of Anne of 1797, which is regarded as the first modern copyright statute. Its title states that it is “An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors . . . during the Times therein mentioned.”¹⁰

According to the utilitarian purpose for which copyright law was developed, monopoly protection of intellectual property and incentives to authors should be provided only to the extent to which the production of future works of authorship or of other kinds of products is not stifled. As a result, striking a balance between providing exclusive rights to the creators to stimulate authorship and

8. *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984), *rev'd* 659 F.2d 963 (9th Cir. 1981); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), *rev'd* 972 F.2d 1429 (6th Cir. 1992).

9. U.S. CONST. art. I, § 8.

10. Act for the Encouragement of Learning, 1709, 8 Ann., c. 19 (Eng.).

limiting their monopoly right to prohibit stifling use and future creation of other works of authorship is both important and difficult. A few copyright doctrines are designed to address this issue, including the provision that the monopoly right is not regarded as a natural or absolute right and that it may be conferred only "for limited times." Another such doctrine is the rule that copyright does not protect ideas but only a particular expression of ideas.¹¹

One of the most important rules that limit copyright protection to reflect the basic goal of copyright law is the fair use doctrine, which balances individuals' claims to their works against the public's right to make the most beneficial use of the works. The concept of fair use is given statutory recognition in section 107 of the 1976 Copyright Act, which provides that "the fair use of a copyrighted work . . . is not an infringement of copyright."¹² When a copyrighted work is used for purposes such as criticism, comment, reporting, teaching, research, or for otherwise fair purposes, that use would not infringe the author's rights.¹³ The statute states that in determining whether the use made of a work in any particular case is a fair use, the following four factors shall be considered:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.¹⁴

Users of copyrighted work often use fair use as an affirmative defense of their activities, but Judge Pierre N. Leval, in his famous article on fair use, warns that fair use should not be considered the exception to copyright but that its function is integral to objectives and necessary to the overall design of the copyright system.¹⁵ Despite the importance of the doctrine in the copyright system, a precise definition of the concept of fair use has not emerged, and in fact, courts have described the fair use doctrine as "the most troublesome

11. 17 U.S.C. § 102(b) states that in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, etc.

12. 17 U.S.C. § 107 (2000).

13. *Id.*

14. *Id.* Courts differ in interpreting and applying these four factors and often give different weight to each factor.

15. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

in the whole law of copyright.”¹⁶ Added to the existing ambiguity is the recent significant shift in fair use analyses, characterized by the focus on whether the use in question is “transformative,” a shift that began after the United States Supreme Court’s 1994 decision in *Campbell v. Acuff-Rose Music, Inc.*¹⁷ The concept of transformative use, or the productive use in other cases, influenced lower courts’ decisions and evoked a great deal of scholarly debate.

Much of the debate in scholarly discussions and court cases seems to stem from confusion concerning the point of focus in the application of the concept of fair use that promotes creativity and increases public benefit. Should the rationale for providing the fair use doctrine concern the end users’ use of a work as the essential justification of the use or the potential author’s use of the materials and subsequent creation of a new intellectual result? Courts and scholars disagree on whether the policy goal that is to be achieved by the fair use doctrine concerns the broad dissemination of intellectual works and widespread use by end users or the creation of new intellectual works that is stimulated and made available by the use of copyrighted materials without the owner’s consent. Where the doctrine is applied depends on the facts of each case, but serious problems arise when a rule that was made to handle one type of facts is often used for the other. The following analysis of the development of the transformative rule is guided by a concern about the answers that are supplied to this question.

II. Development of the Transformative Use Rule

A. Productive Use in *Sony*

The first reported decision to use the term “productive use” was the Ninth Circuit’s opinion in *Universal City Studios, Inc. v. Sony Corp. of America*.¹⁸ Most of the prior fair use analyses in courts, especially regarding the first factor of the purpose of use, had focused on whether the work in question was used for a commercial purpose or for a nonprofit educational purpose.¹⁹ But the appellate court of *Sony*, discounting the district court’s “simple commercial/noncommercial distinction,” found that off-the-air home video-recording of broadcast programs was not a productive use and that

16. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939).

17. *Campbell*, 510 U.S. 569.

18. 659 F.2d 963 (9th Cir. 1981).

19. WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985).

the absence of a productive use precluded a finding of fair use.²⁰ The productive use in the appellate court of *Sony* was not concerned about the end user's benefits that can be acquired by his use of the VCR for convenience or increased access but viewed productive use as requiring the creation of a new work. The appellate court, citing Leon Seltzer, suggested that fair use had to do with the second author's use of the first author's work to create a new work rather than with the mere reproducer who uses it for its intrinsic, ordinary purpose.²¹ The court argued that the statute does not list "convenience" or "entertainment" or "increased access" as purposes within the general scope of fair use²² and expressed concerns with the "harm" to a plaintiff by instant reproduction of the work in the same mode and with the same purpose as the original, particularly in the context of new technology, which greatly increases access to work.²³

But the Supreme Court put aside the court of appeal's "productive use" doctrine, stating that the "productive" and "non-productive" distinction may be helpful in some circumstances but that such a distinction could not be "wholly determinative."²⁴ The Court also marginalized this rule by placing the limited discussion of the issue in a footnote. Declaring that home recording was a non-commercial activity and therefore presumptively a fair use, the Court again shifted its focus on the commercial/noncommercial dichotomy and decided that without any direct commercial gain from such activity of time-shifting programs, the use was a fair use. Only Justice Blackmun's dissenting opinion supported the use of "productive use" guidelines.

Regarding the conceptualization of the productive rule in *Sony*, the Court of Appeals seems to have used the concept of productive use to mean the potential author's use of the work to create other materials rather than the end user's use of work for diverse purposes. The Supreme Court's view is more ambiguous. The Court does not explicitly view the productive use as limited to the use resulting in secondary works of authorship. But its rationale for rejecting the productive use factor as a determinative factor shows the Court's focus on the economic consequences of copying. It compares copying of a news broadcast with copying of a motion picture, and copying to

20. *Universal City Studios*, 659 F.2d at 970-71.

21. *Id.* at 970; LEON SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978).

22. *Universal City Studios*, 659 F.2d at 970 (emphasis original).

23. *Id.* at 971.

24. *Sony*, 464 U.S. at 455 n.40.

prepare lecture notes with copying to broaden personal understanding, all of which may or may not involve the creation of a secondary work. But the Court does recognize that the use of no productive purpose, such as mere convenience of time-shifting, still may result in a comparable benefit by increased viewer access.²⁵ The Supreme Court's rationale for not wholly relying on the productive versus non-productive distinction seems to show its uneasiness with adopting the Ninth Circuit's position to acknowledge openly the creation of secondary work.

Justice Blackmun's dissent position in the *Sony* case is stronger. His discussion of productive use not only focuses on the creation of a new work but even assumes that any ordinary use is non-productive use.²⁶ Blackmun notes that no author could create a new work if he first were required to repeat the research of every author who had gone before him; and in the case of a scholar's work, the fair use doctrine acts as a form of a subsidy to permit the second author to make limited use of the first author's work for the public good.²⁷ He also argues that the examples in the statute itself, such as "criticism, comment, news reporting, teaching . . . scholarship, or research," constitute productive use, resulting in some added benefit to the public beyond that produced by the first author's work. He concludes by stating that "I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use"²⁸ and that "there is (then) no need whatsoever to provide the ordinary user with a fair use subsidy at the author's expense."²⁹ Thus, according to the *Sony* dissent, an ordinary use cannot be a productive use, and increasing access to television programming is an attempt to stretch the doctrine of fair use.³⁰ Justice Blackmun's view is that the *Sony* Court attempted to stretch the doctrine of fair use that permits unfettered use of this new technology to increase access to television programming.

Interestingly, despite the Supreme Court's avoidance of reliance on the productive use principle, the principle continued to be given authority.³¹ After *Sony*, the predominant meaning of productive use

25. *Sony*, 464 U.S. at 455 n.40.

26. *Id.* at 476 (Blackmun, J., dissenting).

27. *Id.*

28. *Id.* at 478-79 (Blackmun, J., dissenting).

29. *Id.* at 480 (Blackmun, J., dissenting).

30. *Id.* at 480-81 (Blackmun, J., dissenting).

31. Laura G. Lape, *Transforming Fair Use: The Productive Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677 (1995).

has been use that produces a new work.³² The term "productive use" has been employed primarily to connote a use that changed the copied materials in producing a new work.³³

B. Transformative Use in *Campbell*

The term "transformative use" first appeared in *Campbell v. Acuff-Rose Music, Inc.*, which cited Leval's work. Leval, in his article on the fair use standard, argues that the first factor, the purpose and character of use, raises the question of justification of fair use, a defense that turns primarily on whether and to what extent the challenged use is transformative.³⁴ He used the term "transformative use" basically as a synonym for "productive use" in that "the use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."³⁵ Leval distinguishes between simple restatement or repackaging and the secondary use that adds value to the original. He states that "if the quoted matter is used as a raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."³⁶ He lists examples of transformative uses such as criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend, rebut, or parody it, or for purposes of symbolism and aesthetic declarations.³⁷ Thus, Leval is concerned about the social benefit as the copyright law's purpose, but whether he focuses on the enrichment of society by promoting more production of works or means to incorporate other diverse uses of works for personal purposes is not entirely clear.

In *Campbell*, the Supreme Court unanimously adopted the notion of transformative use, citing Justice Blackmun's dissent and Judge Leval's article.³⁸ *Campbell* concerned whether the commercial

32. *Basic Books, Inc. v. Kinko's Graphics*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (stating that the defendant's use was a "mere repackaging" and did not "transform" the copied materials); *American Geographical Union v. Texaco, Inc.*, 802 F. Supp. 1, 11 (S.D.N.Y. 1992); *Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (stating that the use for the intrinsic purpose works against the finding of a fair use).

33. Lape, *supra* note 31, at 712.

34. Leval, *supra* note 15, at 1111.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Campbell*, 510 U.S. 569, 578-79.

parody of Roy Orbison's rock ballad song *Oh, Pretty Woman* by a rap group 2 Live Crew was a fair use. Acuff-Rose, the record company with the copyright to the original song, had refused to allow 2 Live Crew to include the parodied song in the album, although the rap group had offered to pay royalties. When 2 Live Crew went ahead and released the parody song, Acuff-Rose sued for copyright infringement. The district court weighed the four factors of fair use analysis and held that the song was a fair use because it was a parody that took only what was necessary to create the parodic element and because it was extremely unlikely that the parody song could adversely affect the market for the original.³⁹ The Court of Appeals for the Sixth Circuit reversed and remanded in that the song's blatantly commercial purpose prevents this parody from being a fair use.⁴⁰ Citing the decision in *Sony* that "every commercial use . . . is presumptively . . . unfair,"⁴¹ the Court of Appeals argued that harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses.⁴²

The Supreme Court reversed, rejecting the notion that the commercial nature of the use was a definitive factor, let alone that it raised a presumption of unfairness. The Court stated, regarding the examples of fair use given in the statute such as criticism, comment, or news reporting, that "the central purpose of this investigation is to see whether the new work merely 'supersede[s] the objects' of the original creation ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether or to what extent the new work is 'transformative.'"⁴³ The Court noted that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."⁴⁴ Whether the *Campbell* Court treated the transformative use factor as part of the first factor, the purpose and character of use, or as a separate additional factor to be considered in relation to the four statutory factors is unclear. The notion of transformative use is introduced in discussing the first factor in the opinion, but at the same time, the Court's opinion focused not

39. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1154-57 (M.D. Tenn. 1991).

40. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992).

41. *Sony*, 464 U.S. at 451.

42. *Campbell*, 972 F.2d at 1438-39 (6th Cir. 1992).

43. *Campbell*, 510 U.S. at 578-79 (footnotes and citations omitted).

44. *Id.*

on market effects or on commercial purposes but on the creative relationship between the infringed work and the infringing work.⁴⁵ The notion of transformativeness in *Campbell* thus may be interpreted as an attempt to touch directly upon the fundamental goal of copyright in addition to doctrinal analyses of the four separate factors. But the ways in which the transformative use was interpreted and applied in later cases took many shifts and turns, which are discussed in the following section.

III. Transformative Use Rule and the Transformation of Fair Use Analysis

Following *Campbell*, legal scholar Yochai Benkler proposed that the transformative use principle could be an important basis for fair use analysis of digital works of authorship that are characterized by plasticity and processibility.⁴⁶ But other scholars have criticized the fair use analysis of the lower courts, suggesting that the concept became monolithic and was transformed to give advantage to copyright owners.⁴⁷ Drawbacks and misapplications of the concept of the transformative use created a great deal of legal confusion and disagreements, which are addressed in the following.

A. Ambiguous Relationship with the Market Effect Factor

Courts seem to consider productive use or transformative use in relation to the market effect rather than as something separate from it. This tendency is not only incorrect as a matter of legal doctrine but has the serious effect of emphasizing the protection of the initial author's rights and profits.⁴⁸ The productive use factor, when it first appeared in the court of appeals in *Sony*, was concerned with the harm to a plaintiff by reproduction of the work and increased access to the work in the context of new technologies.⁴⁹ The court's rationale for denying fair use arguments is that when the use is not productive, the use that increases the access to the work would harm the initial author. The Supreme Court opinion in *Sony* was also concerned

45. YOCHAI BENKLER, RULES OF THE ROAD FOR THE INFORMATION SUPERHIGHWAY: ELECTRONIC COMMUNICATION AND THE LAW 677 (1996 & Supp. 1997).

46. *Id.* at 676.

47. See Lape, *supra* note 31; Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 COMM. L. & POL'Y 1 (2002).

48. See Bunker, *supra* note 47.

49. *Sony*, 659 F.2d at 971.

about market harm. While refusing to rely on the dichotomy between productive and nonproductive time-shifting that is difficult to identify clearly, the Court only noted that the statutory language requires consideration of economic consequences of copying, and materials with broader secondary markets have a broader claim to protection because of the greater potential for commercial harm.⁵⁰

But it is in Justice Blackmun's dissenting opinion that the relationship between the productive use and the market effect factors was explicitly discussed. Blackmun opined that when the proposed use is an unproductive use, a copyright owner must prove only a *potential* for harm to the market for or the value of the copyrighted work.⁵¹ Blackmun not only assumed that ordinary use cannot create benefit to the public at large but "when the use is one that creates no benefit to the public at large, copyright protection should not be denied on the basis that a new technology that may result in harm has not yet done so."⁵² The *Sony* dissent clearly considers the productive use factor as linked to the market factor.

After *Sony*, the application of the productive use in lower cases made the market effect factor count twice.⁵³ When productive use is equated with nonsuperseding use, it automatically is seen to satisfy the fourth factor of market effect. The resulting focus on protecting the first author's economic interests has an effect of wiping out the first factor of the purpose of use and discounting the fair use balance among the four factors.⁵⁴ In *Campbell*, the Court considered the four factors separately in the analysis and in relation to the transformativeness of the new parodied song. The transformative use appears not only in the analysis of the first factor but in the analysis of the third and fourth factors as well.⁵⁵ In factor three, verbatim copying in large amounts tends to suggest a nontransformative use.⁵⁶ In factor four, transformative use tends to reduce the probability of market harm by market substitution.⁵⁷ The Court particularly focuses on the relationship of transformative use and the inference of market harm, arguing that the only harm to derivatives that is relevant is the harm

50. *Sony*, 464 U.S. at 455 n.40.

51. *Id.* at 482.

52. *Id.*

53. *Texaco*, 802 F. Supp. at 12, 18-19. See also Lape, *supra* note 31, at 717 for relevant analysis.

54. Lape, *supra* note 31.

55. Bunker criticizes this and suggests that fair use analysis has been "transformed." See Bunker, *supra* note 47, at 9.

56. *Id.*

57. *Id.*

of market substitution, and there was no evidence that a potential rap market was harmed in any way by 2 Live Crew's parodied rap version.⁵⁸ The Court viewed the *Sony* case as the one where mere duplication of the entirety of the original clearly supersedes the objects of the original and serves as a market replacement for it and compares it with the *Campbell* case, where the second use of the song is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Because a nontransformative borrowing presumably can act as a substitute for the original, an absence of transformation can serve as a proxy for a determination of market harm under the fourth factor.⁵⁹ After *Campbell*, many court cases explicitly made the link between transformativeness under factor one and market harm under factor four, and the transformative use rule works often as a complementary factor for the market effect factor.⁶⁰

The approach of linking transformativeness and market effect clearly reduces the benefit of introducing the productive use/transformation factor to fair use analysis in addition to the four factors. Use of a copyrighted work is already less likely to be considered fair use if the use influences the copyright holder's market of the work. The underlying assumption is that if the market is affected, it will influence the incentive of authors to create works of authorship. In other words, the market effect factor should be considered significant to the extent that the effect discourages authors' productivity and creativity by stifling authors' incentive to create. Such application raises the question of whether *Sony* and *Campbell* intended to apply the productive use or transformation principle even if the use has the potential to reduce the incentive to create new works. Lape argues that the fair use doctrine applies where the benefit to society of permitting the unauthorized use outweighs the harm to society of reducing the incentive to create new works.⁶¹ Otherwise, the incentive to create new works itself would have been the goal rather than the tool of copyright law, and the principle of productive use or transformation would not have been needed in addition to the fourth factor of market effects. Because the application of transformative use to later lower court

58. *Campbell*, 510 U.S. at 592-94.

59. Bunker, *supra* note 47.

60. *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2d Cir. 1998); *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

61. Lape, *supra* note 31, at 678.

decisions after *Campbell* is redundant with the application of the fourth factor, discussions in the courts tended to focus even more on protecting the initial author's rights and profits. Such a focus may seriously skew the copyright balance, which is the underlying rationale for including the fair use doctrine in the copyright system.

B. Confusion Concerning the First Factor of the Purpose of Use

Although *Campbell* introduced the transformative use discussion within the four-factor analysis, the concept of transformative use was applied in addition to the four-factor analysis—the more transformative the work is, the less important are the four factors. Thus, the transformative use was not explicitly incorporated in the first factor analysis in the *Campbell* case but was employed as an additional consideration of the policy goal of copyright. Later courts, however, have begun importing into their application of the first factor—the purpose and character of the use—a concern with productive use or transformative use by questioning whether the defendant transformed the copied material in producing a new work. Incorporating the transformative use concern in the first factor analysis itself may not be problematic, but employing it as a part of the two-prong analysis—the first is whether the use is commercial or not and the second whether the use has transformed the initial work or not—seems to twist the result of the fair use analysis. For example, the district court in *American Geographical Union v. Texaco*, in dealing with the first factor, found that photocopying of scientific journals for use by researchers in a corporation was not fair use because the use was not transformative, although the use was for research.⁶² In *Weissman v. Freeman*, the use of a nuclear medicine educational syllabus was not considered fair use because it was not transformative, even though the purpose was for teaching.⁶³ Focusing on the productive nature of the defendant's creation of the new work in these cases led to disfavoring socially beneficial nonproductive uses.⁶⁴ Consequently, certain uses become disadvantaged in fair use analysis that considers a productive/transformative use factor, including such uses as photocopying for research and education, news publishing, dissemination of information through the Internet, and amateur music performances.⁶⁵ This result threatens to skew the balance the fair use doctrine attempts to achieve.

62. *Texaco*, 802 F. Supp. at 16.

63. *Weissman*, 868 F.2d 1313.

64. *Lape*, *supra* note 31, at 715.

65. *Id.*

As used as an additional requirement for the defendants, the principle of transformative use not only directly contradicts the rationale and philosophy that included the fair use doctrine in the copyright system but also is not consistent with the definition and intention of the first factor, the purpose and character of the use. If it was to be included in an analysis of the first factor, the question clearly should have focused on the purpose of "use" of the defendants and how transformative or productive that use is, which could include various ways of using the initial work from the perspective of the users. But the recent cases consider the "transformed" nature of the resulting work of authorship or the creation of a new work, skewing the focus of analysis to the nature of the secondary "work" or the "creation" from "use."

The transformative use principle should be applied either in the way in which it was applied in the *Campbell* case—as an additional consideration that touches upon the policy concerns for a situation where the defendant is not an end user but a subsequent, future creator of a new work—or in a way that incorporates the transformative nature of the use itself in the analysis of the first factor. Transformation of the analysis of the first factor by introducing the concept of transformative use in this way would provide useful guidance for analyses of general fair use, as well as for analyses of digital works.

C. Transformativeness in the Production of Work Rather Than the Use of Work

In *Campbell*, by stating that "the goal of copyright . . . is generally furthered by the creation of transformative works," the Court expresses more concern about the creation of new works than the end users' use. The Court's position is that the more transformative the "new work," other factors become less significant.⁶⁶ Thus, if the "work" rather than "use" is transformative, other factors have less force. This confusion of the transformativeness of the work with transformativeness of the use is the reason behind later disagreements among the courts and scholars. It also is the reason why the transformative use factor, which has great potential to provide guidance to fair use cases regarding many, including digital, works of authorship, has proved less useful so far. In the *Napster* decision, the Court of Appeals for the Ninth Circuit regarded the factor of transformativeness as the first prong of the analysis of the

66. *Campbell*, 510 U.S. at 579.

first factor. Considering the purpose and character of the use, the court asked “whether and to what extent the new work is ‘transformative’” and concluded that downloading MP3 files does not transform the copyrighted work.⁶⁷ In *Napster*, the transformative use rule was also interpreted to mean the transformativeness of the new work rather than of the defendant’s use. Even though the Napster users did not have direct economic benefit of any commercial gain, their “saving” the expense of purchasing authorized copies of the music was considered to demonstrate the commercial nature of the use.⁶⁸

The district court and the U.S. Court of Appeals for the Second Circuit in *Infinity Broadcast Corp. v. Kirkwood* vividly show the contrast between an approach that focuses on the transformativeness of the work and one that focuses on the transformativeness in use.⁶⁹ The district court had found that Dial-Up’s use of remote broadcasts is transformative because it is used for a different purpose than the original broadcasts. While the purpose of the original broadcasts was entertainment, Dial-Up’s use was informational for its clients. But the Second Circuit rejected this purpose-of-use-based approach by arguing that Dial-Up had not altered the broadcasts but merely reproduced them over phone lines. Even though the court found some potential public benefit to Dial-Up, it still held that the use was not fair use because of the absence of the transformativeness.⁷⁰

If the transformative use factor focuses not on the users but on consideration of whether their hard work deserves fair use defense, it becomes a quasi-moral scheme that implies that the user must earn the fair use right through good behavior.⁷¹ Bunker suggests that a critical error of Judge Leval and his followers in the courts is their incorrect focus on the transformation of copyrighted works rather than on their broad dissemination, which in Bunker’s opinion, should be the purpose of fair use.⁷² In the copyright system, the hard work of an author does not automatically provide the author with copyright, as found in *Feist Publications, Inc. v. Rural Telephone Service Co.*, which rejected the “sweat of the brow” theory and held that facts are not entitled to copyright just because of the hard work of gathering

67. *A&M Records*, 239 F.3d at 1015.

68. *Id.*

69. *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998).

70. *Id.* at 109.

71. Bunker, *supra* note 47, at 22.

72. *Id.* at 23.

the facts.⁷³ Bunker argues that in the same vein, hard work or the absence of hard work by a putative user should be irrelevant in a fair use determination, and the issue of the public good should control the analysis.⁷⁴

The rationale behind the commercial use factor analysis of *Napster*—that the users should not have gained or saved any economic value from the use for their use to be considered a fair use—also implies a moral judgment against users' benefits. Bunker suggests that a way to make the public benefit a key variable in fair use analysis is to acknowledge the value of dissemination of works and ideas in addition to the activities of individual fair users.⁷⁵ Bunker's emphasis on the value of the dissemination of new works and ideas is a pertinent one, but the benefit of the public at large cannot be achieved without paying adequate attention to individual users' activities. Therefore, the benefits may multiply if not only the broad dissemination of new works but also diverse and creative ways of using the new works are encouraged. This paper attempts to speculate the ways in which potential, creative ways of individuals' uses may be acknowledged by redefining the concept of transformative "use."

IV. Suggestions for the Application of Transformative Use to Digital Works

The transformative use rule—as well as the ways in which it was interpreted and applied in lower courts—itself has been criticized. Does such criticism mean that the transformative use rule should be discarded? Bunker suggests that the overemphasis on transformative use is incorrect as a matter of legal doctrine and harmful to the public interest and calls for a de-emphasized and clarified version of the doctrine.⁷⁶ In contrast, this paper suggests that the transformative use rule has great potential to become a pertinent and useful guideline for fair use analysis, depending on how it is interpreted and applied. The focus in interpreting the transformative use may be either the private right of the initial author (to make a derivative work and profit from it) or the public benefit. To achieve public benefit, transformative use

73. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (finding that copying names, towns, and telephone numbers from the plaintiff's white pages did not infringe because effort cannot substitute for originality and no originality was taken).

74. Bunker, *supra* note 47, at 23.

75. *Id.*

76. *Id.* at 24.

may be interpreted in one of two ways. It may mean the creation of a new work made possible by the defendant's use of the initial work, emphasizing indirect public benefit achieved by the promotion of creativity and a better information environment, or mean the defendant's use of the work itself and how creative that use can be, emphasizing direct public benefit by individual users' welfare. Both approaches to achieving public benefit, indirect or direct, should be recognized if the objectives of the copyright system are to be achieved. The current ways of interpreting and applying transformative use, however, focus either on the private interests of the initial author's rights or the indirect public benefit achieved by the defendant's use of the initial work to transform it and create a new work out of the use. Critical scholars have suggested a shift of focus of transformative use from the market effect and the initial author's right to the dissemination of and access to existing works of authorship. In addition, this paper argues for interpreting and applying the rule as one that governs the purpose of use, as the term itself suggests, in a way that encompasses creative and unprecedented activities of users with different kinds of new works. The following ways of redefining the concept of transformative use are useful in the process.

A. Using the Rule As a Separate Policy Consideration

When application of the transformative use factor is concerned solely with whether the purportedly infringing work adversely affects the market for sale of the initial work, transformative use functions as a redundant factor with the fourth one of market effects. But when the transformative use factor asks whether the new work significantly adds to the universe of information available to society, it begins to function as an additional consideration to enhance public benefit, which is the goal of copyright. Some courts, by focusing on the nature of the new work—the transformativeness of the newly created work—actually apply transformative use as an additional fifth factor in fair use analysis. The “nature of the infringing work” seems to have been introduced in such a framework. This approach may be subject to the criticism that it turns fair use analysis into a normative analysis by delegating to courts the decision of what constitutes a transformed work and what kind of work deserves fair use defense.⁷⁷ Bunker points out that courts engage in very little analysis and show very little consistency in what constitutes transformative use due to

77. Bunker, *supra* note 47, at 9-16.

confusion with the notion of derivative work, which, by statutory definition, is "any other form in which a work may be recast, transformed, or adapted."⁷⁸ In that case, the creation of a derivative work should be at least some evidence of transformativeness.⁷⁹ But in *Ty, Inc. v. Publications International*, the court acknowledges that the photographs of toys are "[a]t the least . . . derivative works," but later finds that, without much analysis, they are not transformative.⁸⁰ Despite this possible confusion and inconsistency, focusing on the nature of the new work is still better than equating the transformative use factor with the fourth factor, considering the market effect factor twice and discounting the first factor of the nature of the defendant's use, all of which may have the consequence of overly emphasizing the initial author's rights and interests.

This paper also suggests that a focus on the nature of the new work has other advantages in the changing information environment, if transformative use is applied separately as a policy consideration. When transformative use is interpreted to mean adding something new to the information environment, which is not limited to information market but includes noncommercial space, this factor can function to achieve what the market effect factor cannot deal with effectively. The factor of the market effect assumes a stagnant market, including that for derivative works. But digital technology generates more and more possibilities of creating new, different markets or spaces for different products and activities. More and more products or activities that may or may not influence the current or potential market of the initial work evoke new, unprecedented desires, interests, and actions that, again, may or may not lead to new markets for profits. That is why Benkler suggests that focusing on creativity and the transformative nature of a work based on a borrowing is of particular importance in the context of digital media.⁸¹ A work can be substantially transformative so that it is not a derivative work and does not share the market of the initial work in any way but creates something new. The transformative use factor can be used to encompass the possibility of creating a new, different market or space for different products and activities. In that sense, the factor of transformative use can function as something different from the market effect factor or derivative work analysis.

78. 17 U.S.C. § 101 (1994); Bunker, *supra* note 47, at 11.

79. *Id.* at 11.

80. 81 F. Supp. 2d 899, 902 (N.D. Ill. 2000).

81. BENKLER, *supra* note 45, at 678.

Digital media has many characteristics different from traditional media, one of which is its plasticity and interactivity.⁸² Digitization means that all information, including text, audio and video content, can be used in any order and can be rearranged at will. Digital content can be transformed for use in another medium—for example, from text to voice or vice versa.⁸³ Works in digital form easily can be added, deleted, edited, or otherwise modified and manipulated. On the Internet, derivative work products with a large array of differing degrees of added creativity are produced and transmitted. “Digital information, unconstrained by packaging,” becomes a continuing process.⁸⁴ New works that never existed before and new markets for new consumers are continuously being created. In such circumstances, a focus on the fourth factor of market effects or market substitutes denies most of the derivative works that are created by digital technology because the market structure is so finely divided that even a derivative work that appeals to a very narrow segment of the market nevertheless can be commercially viable and thus constitutes commercial substitute for the initial work.⁸⁵ The current fair use analysis, especially the fourth factor of market effects, assumes relatively stable markets for relatively unchanging products and consumers. Therefore, although the copyright system generally has protected the market for the initial work, even within the fair use doctrine that is designed to provide limitations on the initial author’s rights, digital technology rocks this rather stable market situation. When the market effect factor is strictly applied, the very production of new kinds of works and newly created markets and consumers may be seriously stifled. The shift of a focus to the creative or transformative nature of new, derivative works may then be a welcome tool for maintaining the balance of the copyright system and maintaining copyright’s purpose of public benefit while being open to yet-to-be-known ways of using and creating works of authorship.

In retrospect, what actually happened after *Campbell* is opposite to the expectation that Benkler optimistically envisioned. In the courts after *Campbell*, transformative use was incorporated as part of the analysis of the first factor and interpreted as an additional

82. BENKLER, *supra* note 45, at 678; NICHOLAS NEGROPONTE, *BEING DIGITAL* (1994).

83. ROBERT H. ANDERSON, TORA K. BIKSON, SALLY ANN LAW, & BRIDGER M. MITCHELL, *UNIVERSAL ACCESS TO E-MAIL: FEASIBILITY AND SOCIETAL IMPLICATIONS* 96 (RAND).

84. John Perry Barlow, *The Economy of Ideas*, WIRED 2.03 (1994), at 9.

85. BENKLER, *supra* note 45, at 679.

requirement that defendants must prove to prevail on a fair use defense. This incorporation occurred because transformative use was narrowly interpreted pursuant to the *Campbell* case's factual situation, which involved a secondary author's creation of a new, commercial work, even in cases where the end user's use of the initial work was at issue. As a result, the transformative use factor focuses on the industry rather than social utility of the use.⁸⁶ Next, this paper proposes a new way of applying the transformative use rule as a part of the first factor— the nature of the purpose of use.

B. Acknowledging Creativity and Transformativeness in the Use and Individuals Users

In the fair use analysis after *Campbell*, courts often incorporated the transformative use rule in the first factor of the purpose of use as an additional requirement to produce a new kind of work. The result was the expansion of the protection of initial authors' rights and limited room for fair use of copyrighted works. But it is important that the difference between the "creation" of a transformed work or "transformation of the work" and "transformative use" be noted. "Courts have been reluctant to conclude that access outweighs copyright's incentives scheme" when the use is ordinary consumer use rather than potential secondary author's use.⁸⁷ Their reluctance seems to reflect the information environment in which the modern copyright law evolved—that of the printing press. In circumstances in which a greater number of works in the information environment would increase the benefits to the public, copyright law's incentive system naturally focuses on the creation of new works of authorship. That is why the modern copyright laws are structured in a way that provides incentives to authors so that more works can be created.

But the characteristics of digital technology and computer networks change the value of information based on its meaningfulness.⁸⁸ As the production and dissemination of information rapidly expand, offering points of view and estimating authority can provide useful guidance to users. Information on the Internet might be infinite and unbounded, but it is limited by the amount of human attention.⁸⁹ People's presence, time, and attention become more valuable. In the case of business information, value results from

86. Lape, *supra* note 31, at 723.

87. Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 286-287 (2002).

88. Barlow, *supra* note 84.

89. Esther Dyson, *Intellectual Property On the Net*, Release 1.0. (1992), at 13.

interpretation and analysis by people, which depends on the specific efforts and skill of the individuals interpreting it.⁹⁰ In addition, attending a concert and listening to a song on a tape are quite different experiences.⁹¹ The value of information is thus generated by the activity and presence of a person rather than by the ownership of the content.⁹² The fact that real-time performance and services generate value presents an interesting shift in which information economics are based on relationship rather than possession. Building a relationship with a customer becomes more important than controlling the copies of the content.⁹³ The relationship of the sender and the receiver of information, the depth of their interactivity, and the value of what is sent depends on the extent to which each individual receiver has receptors such as shared terminology, attention, interest, language, and paradigms that are necessary to render what is received meaningful.⁹⁴

An important possibility is presented here: receiving information can often be as creative as generating it. Having access to information, the ability to choose, process, and edit the information is more important. Peer-to-peer technology qualitatively enhanced users' access to the existing materials and abundant information, and also increased the possibility of users simultaneously becoming producers for their own purpose at the same time. Therefore, the question of where the creativity lies—a critical one in copyright law—becomes more complicated, and the distinction between creators of information and users of information becomes fuzzy. In such a

90. Dyson, *supra* note 89, at 15 (Esther Dyson points out that although principles are easy to develop, matching them to specific instances is the intellectual exercise that adds true value). Barlow, *supra* note 84, at 15 (Barlow similarly points out the "question and answer" relationships between authorities and those who seek their expertise).

91. Dyson, *supra* note 89, at 11-12.

92. Barlow, *supra* note 84, at 15 (Barlow states that "the value of that relationship will reside in the quality of performance, the uniqueness of your point of view, the validity of your expertise, its relevance to your market, and . . . the ability of that market to access your creative services swiftly, conveniently, and interactively"). Dyson, *supra* note 89, at 32 (Dyson agrees by saying that "few kinds of content-based value that can be created on the net would include services, the selection of content, the presence of other people, and assurance of authenticity . . .").

93. Dyson, *supra* note 89, at 3 (Dyson explains that a subscription would be a good way to solve the problem generated by network externalities and a need to distribute broadly). See also KATSH, *supra* note 1, at 225.

94. Dyson, *supra* note 89, at 32; Brian Kahin, *The Internet Business and Policy Landscape*, ANN. REV. OF INST. FOR INFO. STUD. 47, 66-67 (1997) (Kahin also acknowledges that the ultimate value of the Internet or products and services on the Internet depends on users' software, their ability to use the software, and their skills at navigating the Internet).

situation, a work itself may not be transformed and reproduction of the initial work may be made almost in its entirety, but the use of the work can still be creative and transformative. When a user's use of a work or works is so creative that is not likely to be possible through any pre-existing means and thus the public benefit is clearly enhanced by this kind of use, the use is "transformative."

The characteristics of digital materials cut both ways for the applicability and usefulness of the transformative use doctrine. The characteristics of the technology of plasticity and interactivity provide opportunities for users of information to become creators of a new work by taking, borrowing, cutting, pasting, editing, and adding. Users are now active participants in the process of dissemination and the production of knowledge and information.⁹⁵ What the courts and even critical scholars of the transformative use principle tend to miss is that the creativity involved in the use of works of authorship is critical in digital environment. The relationship between the author and user is not only blurred, but the ways in which value is generated and the public obtains benefit from the information are transformed.

A redefinition of "transformative" poses a great challenge to the interpretation of the precedents. For example, Justice Blackmun's dissent in *Sony* stating that the consumer's ordinary use cannot be considered productive use is in direct opposition to the active and interactive users of the internet. The reality of the changing environment suggests that without acknowledging the creativity and transformativeness that occur in the process of the use of information itself, copyright law lags behind, vainly trying to protect what no longer helps to promote the progress of science and useful arts. More "creation" of works of authorship is no longer critical or essential in the progress of science and useful arts, because there is already an abundance of information out there. Now dissemination of, access to, and diverse, creative use of existing works of authorship for users' personal purposes through customization, personalization, and further communication become more important for public well-being and happiness. When the ways in which value is created from the works of authorship are changing in the interactive digital environment, acknowledgement of the creativity and transformativeness of more active participants and their new ways of interacting, living, and seeking happiness should be an important consideration in interpreting and applying the transformative use principle. Thus, transformative use should be interpreted to

95. BENKLER, *supra* note 45, at 678.

encompass more access, more usability, more personalization, more freedom to use existing works, more communication, and the building of more relationships using works of authorship.

Conclusion: Revisiting “Use” in the Interactive Environment

In the preceding sections, this paper has examined how the notions of productive use and transformative use were developed and adopted, focusing on the *Sony* and *Campbell* cases. This paper has analyzed how courts defined and applied the concept of transformative use as meaning the “creation” of transformative work or “work” that is transformed from the initial work rather than transformative “use.” The results of the analysis suggested that the productive use principle in *Sony* and the transformative use principle in *Campbell* are concerned less about the public benefit resulting from more dissemination and end users’ use of works of authorship than about the use of copyrighted materials to create new works of authorship. But transformative use was largely interpreted and used as introducing an additional requirement of having a transformative character for the users of the initial work in many lower court decisions. Consequently, the transformative use principle has had the effect of expanding the protection of copyright holders’ rights and reducing the room for fair use of copyrighted works. If the meaning of transformative use to create new works is not limited to the original copyrighted author’s right to create derivative works but is expanded to include a new, potential user/author’s creation of new works (derivative or not), the transformative use principle can be a useful tool for striking a proper balance in the concerns of all parties in copyright. In addition, this paper suggests application of the notion of transformativeness and creativity to the users’ “use” of works of authorship as well as their subsequent “creation” of new works, arguing that interpreting transformative use in such a way is more consistent with copyright’s purpose and also encompasses digital works of authorship in an interactive information environment.

Digital media are changing the ways in which people consume, use, and interact with intellectual works and with one another. The processes of digitization and networking have collapsed some important distinctions that had existed in the American copyright system, such as that between idea and expression, and among gaining access to a work, using a work, and copying a work.⁹⁶ The most important but less recognized distinction that also has been

96. VAIDHYANATHAN, *supra* note 5, at 152.

influenced is that between producers and consumers of information and culture. Reduced barriers make entrance into information production and distribution easy, but attracting an audience or a market much more difficult.⁹⁷ The recent development and widespread use of peer-to-peer technology drastically changes the information environment once again by increasing its interactivity even further. The system that is more open, interactive, decentralized, and ungovernable is posing yet another challenge to the copyright system that was developed in the context of another particular kind of information technology. The challenge, furthermore, does not stop with copyright law or even the larger legal realm. Despite the court decisions regarding Napster and even "public spectacles of (its) torture,"⁹⁸ the world does not note or mourn the end of Napster of sixty-five million users for long.⁹⁹ As Napster died, it merely yielded space for newer and better technologies of competitors more capable of meeting the current needs of users, who now have found other, better opportunities.¹⁰⁰

Lessig's statement that architecture is a kind of law that determines what people can and cannot do is a pertinent description of today's reality.¹⁰¹ Although some critics such as Raymond Shih Ray Ku declare that copyright is no longer needed for digital works because the economics of digital technology undercut prior assumptions about the efficacy of a private property regime for information, scholars still attempt to incorporate these kinds of circumstances into the existing copyright system.¹⁰² Useful suggestions have been derived from a focus on the fundamental purpose of copyright—the public benefit and public domain. Fair use, and especially the newly established principle of transformative use, seems to play a critical role in the copyright discussion. Bunker's analysis of post-*Campbell* cases shows that "the presence or absence of transformativeness is closely correlated to the overall result of the fair use analysis."¹⁰³ Benefits of dissemination and availability of, and access to, works of authorship that are missing from the current

97. *Id.*

98. Albert Z. Kovacs, *Quieting the Virtual Prison Riot: Why the Internet's Spirit of "Sharing" Must Be Broken*, 51 DUKE L. J. 753 (2001).

99. Llewellyn Joseph Gibbons, *Napster: The Case For the Need For a Missing Direct Infringer*, 9 VILL. SPORTS & ENT. L.J. 57, 85 (2002).

100. *Id.*

101. LESSIG, *supra* note 4, at 58-59.

102. Ku, *supra* note 87.

103. Bunker, *supra* note 47, at 18.

application of transformative use are noted by some scholars,¹⁰⁴ but their focus remains on the larger class of uses that may serve the public interest. Still, individual users' use and creativity in the use, which seem to play the central role in the interactive digital environment, have not received proper attention.

This paper suggests acknowledging transformativeness and creativity in individual users' activities in interpreting the transformative use rule. If this new way of interpreting and applying the transformative use rule had been introduced, the court in *Napster* might have dealt with significantly different questions. The critical questions would have been whether the file-sharing service allows something that previous technology such as CDs could not make available; what kind of new user activities are possible in addition to listening to music; whether the service allows a search function, sampling and browsing before purchasing to buy, a community, interactive communication, emotional interaction, transforming exercises with music files, or any other such innovative activities; and whether all of these were adding something new to the music environment or not. What the answers are to the above questions and the kind of a finding they lead the court to make remain to be seen. There would be many other questions that could be used to determine whether a particular kind of use is transformative or not and whether there is something new in the ways in which the users use and interact with the works. But what can be assured by this approach is an opportunity to explore in reality, before stifled by legal interventions, whether the new service available through peer-to-peer technology makes activities available that were not possible before but that deserves a room in the constantly changing information environment for the public benefit. They might include whether new distribution and sharing system makes music fans more informed consumers, makes the users more expressive and rational by enjoying more information, whether the users can provide better feedback, whether the industry then can become more responsive to users, whether they use the music for more emotional and intimate communication, and whether the quality of life of the public can be substantially enhanced.¹⁰⁵

Copyright law has faced great challenges in a rapidly changing environment, and it will continue to do so with even greater speed and intensity. Despite some scholars' progressive and provocative

104. See Lape, *supra* note 31, at 712-13, Bunker, *supra* note 47; BENKLER, *supra* note 45.

105. VAIDHYANATHAN, *supra* note 5, at 180.

arguments, to change the entire copyright system at this moment, let alone to discard it, is difficult. Interpreting the transformative use rule in a fair use analysis to encompass the notion of creativity in the users' activities, which seems to be proper in terms of linguistic interpretation and as a matter of law, could be a modest first step. Arguing that every creative use or transformative use of a copyrighted work should be considered a fair use would not be consistent with the current digital reality. There would be many situations in which the user's use of the work is transformative but, at the same time, commercial and profitable, thus affecting the initial author's market. In such a situation, the other factors such as market effect and the purpose of use would balance out the fair use analysis. What this paper suggests is that the question of whether a use is so creative that it enhances the social value in a way that is not likely to be possible if it is not allowed as a fair use deserves to be at least one of the considerations in a fair use inquiry. Now seems to be a proper time to shift the focus from markets and producers of intellectual works to users and their activities.

* * *